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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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1 UNITED STATES OF AMERICA,
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3 Plaintiff,
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5 vs.
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7 EVE E. MAZZARELLA,
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9 Defendant.

10 Case No. 2:08-CR-64-JCM

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**Government's Motion for an Order
Deeming the Attorney-Client Privilege
Waived and for a Revised Briefing
Schedule**

I. Introduction

17 In a motion to vacate her convictions and sentence, Defendant Eve Mazzarella
18 alleges that attorneys Douglas Mitchell and E. Robert Wallach provided constitutionally
19 ineffective assistance. This Court ordered the government to respond to Mazzarella's
20 motion, but to address that specific allegation, the government needs information from
21 Mitchell and Wallach. The government accordingly seeks an order allowing it to obtain that
22 information.

23 Defendant Eve Mazzarella filed a motion pursuant to 28 U.S.C. § 2255 to vacate, set
24 aside, or correct sentence by a person in federal custody. ECF No. 700. In her motion—and

1 in the 177-page memorandum of law that accompanied her motion, *see* ECF No. 207—
2 Mazzarella accuses her trial attorneys of providing constitutionally ineffective assistance
3 based. *See* ECF No. 700, at 7–16; ECF No. 701, at 76–145. Her motion and memorandum
4 include numerous accusations of deficient performance, including (among many others) 1)
5 that Wallach “steered this case in the disastrous direction of a trial in order to cash in on
6 [the] \$250,000 trial fee,” ECF No. 701, at 76; 2) that her attorneys grossly misrepresented
7 the possible consequences of convictions, *id.* at 77; 3) that her attorneys did not explain the
8 sentencing guidelines to her, *id.* at 79; 4) that they failed to effectively cross-examine the
9 government’s witnesses, *id.* at 82; 5) that they failed to introduce evidence that, Mazzarella
10 claims, would have created reasonable doubt, *id.* at 93; 6) that they “failed to rebut false
11 testimony,” *id.* at 97; 7) that they failed to introduce evidence to support an advise-of-
12 counsel instruction, *id.* at 125; and 8) that they failed to request use immunity for a certain
13 witness, *id.* at 132; and 9) that they failed to call Mazzarella to testify. *Id.* at 133.

14 On October 24, 2018, this Court issued an order directing the government to
15 response to Mazzarella’s motion within 21 days, *i.e.*, by November 14, 2018. ECF No. 706.

16 **II. Points and Authorities**

17 “It has long been the rule in the federal courts that, where a habeas petitioner raises a
18 claim of ineffective assistance of counsel, he waives the attorney-client privilege as to all
19 communications with his allegedly ineffective lawyer.” *See Bittaker v. Woodford*, 331 F.3d
20 715, 716 (9th Cir. 2003) (citing *Wharton v. Calderon*, 127 F.3d 1201, 1203 (9th Cir. 1997)).
21 “Where a party raises a claim which in fairness requires disclosure of the protected
22 communication, the privilege may be implicitly waived.” *United States v. Ortland*, 109 F.3d
23 539, 543 (9th Cir.), *cert. denied*, 522 U.S. 851 (1997) (citations omitted). Mazzarella’s
24 motion and memorandum include numerous accounts of conversations she allegedly had

with her attorneys and advice they alleged provided, or failed to provide to her. To respond to Mazzarella's accusations, the government needs to hear Mitchell's and Wallach's side of the story.

“A reasonable tactical choice based on an adequate inquiry is immune from attack under *Strickland*.” *Gerlaugh v. Stewart*, 129 F.3d 1027, 1033 (9th Cir. 1997); *see also United States v. Quintero-Barraza*, 78 F.3d 1344, 1348 (9th Cir. 1996) (Defense counsel’s actions are not considered deficient when made for tactical and strategic reasons that were not “outside the wide range of professionally competent assistance”). Mazzarella’s motion and memorandum include numerous complaints about actions her attorneys took, or did not take, at trial. To response to those accusations, the government needs to hear Mitchell’s and Wallach’s explanations for why they did or did not take those actions, and whether their decision were reasonable tactical or strategic choices.

III. Conclusion

WHEREFORE, based on the foregoing, the government respectfully requests that the attorney-client privilege in 2:08-CR-64-JCM be deemed waived as to the above-referenced matters, which Mazzarella put at issue in her motion to vacate, set aside, or correct sentence. The government respectfully request that this Court order Mr. Mitchell and Mr. Wallach to provide the government, within 60 days after the date of the Court's order, affidavits or declarations, as well as any relevant materials and information, addressing whether the allegations in Mazzarella's motion and memorandum.¹ The government further requests that it be granted an additional 60 days, after receiving Mr.

¹ The government usually asks for an order directing counsel to provide an affidavit or declaration within 30 days, but requests 60 days here in light of the large number of, and level of detail in, the accusations Mazzarella raises against her attorneys, and the expectation that it will take time for her prior attorneys to compile information and draft comprehensive responses to those accusations.

1 Mitchell's and Mr. Wallach's affidavits or declarations, to file its response to Mazzalrella's
2 2255 motion.

3 Dated this 5th day of November, 2018

4 DAYLE ELIESON
5 United States Attorney

6 s/Elizabeth O. White
7 ELIZABTH O. WHITE
Appellate Chief and
Assistant United States Attorney

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11 **CERTIFICATE OF SERVICE**

12 I certify that on November 5, 2018, I electronically filed the foregoing Government's
13 Motion with the Clerk of the Court by using the CM/ECF system.

14 In addition, I sent a courtesy copy of the foregoing motion via email to Douglass A.
15 Mitchell, Esq., at dmitchell@bsfllp.com; and sent a courtesy copy of the foregoing motion to
Robert Wallach via U.S. mail at the following address:

16 E. Robert (Bob) Wallach, Esq.
17 Attorney at Law
18 155 Jackson Street, Suite 602
19 San Francisco, CA 94111

20 Dated: November 5, 2017

21 s/ Elizabeth O. White
22 ELIZABETH O. WHITE
23 Appellate Chief and
24 Assistant United States Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Case No. 2:08-CR-64-JCM

Plaintiff,

VS.

Order

EVE E. MAZZARELLA,

Defendant.

Based upon the pending motion of the government, and good cause appearing,

IT IS HEREBY ORDERED that the attorney-client privilege in 2:08-CR-64-JCM

between the Defendant, Eve Mazzarella; and attorneys Douglas Mitchell, Esq. and Robert Wallach, Esq., shall be deemed waived for purposes relating to Mazzarella's motion under 28 U.S.C. § 2255 to vacate, set aside or correct her sentence. Mr. Mitchell and Mr. Wallach shall, within 60 days of this order, each provide the government with an affidavit or declaration addressing the allegations of ineffective assistance of counsel raised in Mazzarella's motion. Further, Mr. Mitchell and Mr. Wallach may communicate with government counsel and provide supporting documentation regarding all matters put at issue in Mazzarella's motion.

The government shall have an additional 60 days, after receiving Mr. Mitchell and Mr. Wallach's affidavits or declarations, to file its response to Mazzarella's 2255 motion.

DATED this 2nd day of April , 2019

UNITED STATES DISTRICT JUDGE
